



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 6, 2016

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2016-00376

Dear Ms. Parker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 593077.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified portion of the I-35 East highway. The department states it has released some of the requested information, but claims the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹ We have also received comments submitted by a representative of LBJ Infrastructure Group and Trinity Infrastructure L.L.C. (collectively, "Trinity").²

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

²We note the department does not inform us any additional responsive information exists, or may exist, in the possession of Trinity, nor does the department seek to withhold any such information. Thus, we do not address Trinity's arguments regarding any additional responsive information that may be in its possession. *See* Gov't Code § 552.301(e) (requiring governmental body to submit certain information within fifteen business days of receiving request for information, including comments explaining applicability of raised exceptions and copy of information governmental body seeks to withhold or representative samples).

See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted information contains daily traffic control inspection reports that are subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Section 552.103 of the Government Code is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the submitted daily traffic control inspection reports under section 552.103.

Section 552.103 provides in part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated

on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act (“TTCA”), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

The department states it received a notice-of-claim letter before it received the request for information. The department does not affirmatively represent to this office the claim letter is in compliance with the TTCA. Accordingly, we will only consider the claim as a factor in determining whether the department reasonably anticipated litigation over the incident in question. After reviewing the submitted arguments and documents, and based on the totality of the circumstances, we conclude the department has established it reasonably anticipated litigation when it received the request for information. Our review of the remaining documents also shows they are related to the anticipated litigation for purposes of section 552.103(a). Therefore, the department may withhold the remaining information under section 552.103 of the Government Code.

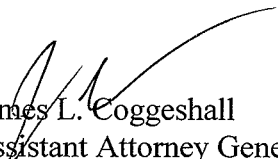
However, we note once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

To conclude, the department must release the submitted daily traffic control inspection reports. The department may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bhf

Ref: ID# 593077

Enc. Submitted documents

c: Requestor
(w/o enclosures)